RECORD AND BRIEFS

Nos. 16-285, 16-300 & 16-307

In The
# Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
*Petitioner,*
v.
JACOB LEWIS,
*Respondent.*

ERNST & YOUNG, LLP, ET AL.,
*Petitioners,*
v.
STEPHEN MORRIS AND KELLY McDANIEL,
*Respondents.*

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
MURPHY OIL USA, INC., ET AL.,
*Respondents.*

**On Writs Of Certiorari To The United States Courts Of Appeals For The Seventh, Ninth And Fifth Circuits**

## BRIEF OF THE AMERICAN STAFFING ASSOCIATION, TRUEBLUE, INC., RESTAURANT LAW CENTER, NEW YORK STAFFING ASSOCIATION, STAFFMARK, ON ASSIGNMENT, INC. AND BELFLEX STAFFING NETWORK, LLC AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS EPIC SYSTEMS CORPORATION, ERNST & YOUNG, LLP, ERNST & YOUNG U.S., LLP, AND RESPONDENT MURPHY OIL USA, INC.

GARRETT R. FERENCZ
TIMOTHY O'DONNELL
1015 A Street
Tacoma, Washington 98402
*Counsel for Amicus Curiae TrueBlue, Inc.*

MELISSA A. SIEBERT
BONNIE K. DELGOBBO
BAKER & HOSTETLER, LLP
191 North Wacker Drive, Suite 3100
Chicago, Illinois 60606

JOHN B. LEWIS
*Counsel of Record*
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
Key Tower, Suite 2000
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

*Counsel for Amici Curiae*
[Additional Counsel Listed On Inside Cover]

STEPHEN C. DWYER
277 S. Washington Street,
Suite 200
Alexandria, Virginia 22314
*Counsel for Amicus Curiae*
*American Staffing*
*Association*

JASON B. KLIMPL
370 Lexington Avenue,
Suite 902
New York, New York 10017
*Counsel for Amicus Curiae*
*New York Staffing*
*Association*

KATHRYN S. BERNARD
435 Elm Street, Suite 300
Cincinnati, Ohio 45202
*Counsel for Amicus Curiae*
*Staffmark*

CRAIG S. HOPEWELL
11591 Goldcoast Drive
Cincinnati, Ohio 45249
*Counsel for Amicus Curiae*
*BelFlex Staffing Network,*
*LLC*

ANGELO I. AMADOR
2055 L Street, N.W.
Washington, D.C. 20036
*Counsel for Amicus Curiae*
*Restaurant Law Center*

KEVIN W. SHAUGHNESSY
JOYCE ACKERBAUM COX
BAKER & HOSTETLER, LLP
Sun Trust Center,
Suite 2300
200 South Orange Avenue
Orlando, Florida 32801

JENNIFER HANKES PAINTER
26745 Malibu Hills Road
Calabasas, California 91301
*Counsel for Amicus Curiae*
*On Assignment, Inc.*

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## INTEREST OF *AMICI CURIAE*[1]

The American Staffing Association ("ASA") is the leading voice for the staffing, recruiting and workforce solutions industry ("staffing industry"). The staffing industry makes a significant contribution to the American economy, providing job and career opportunities for nearly 15 million employees per year. Three million Americans are employed by the staffing industry in any given week. More than one-third of staffing industry employees work in occupations requiring higher education and specialized skills. The average wage rate for staffing industry employees exceeds $17 per hour. Most (76%) of these employees work full time. Employees seek staffing industry employment to increase marketable skills, to obtain a pathway to permanent employment, or because they prefer flexible work schedules. The ASA has over 1,500 staffing industry members who have more than 17,000 offices throughout the United States, and who represent a majority of the revenue in the U.S. staffing industry.

The New York Staffing Association ("NYSA"), an ASA-affiliated chapter, represents the staffing industry within the State of New York. NYSA members place over half a million workers on temporary and contract assignments each year, creating routes to

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[1] Pursuant to Rule 37.6 *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or counsel made a monetary contribution to its preparation or submission. All parties, except the Solicitor General, have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk. The Solicitor General has provided a letter consenting to the filing of this brief.

meaningful employment and substantial economic benefits to the New York region. Individual arbitration agreements and class action waivers are critical to the economic well-being of ASA members, including the NYSA who rely on the efficiency and flexibility of single-plaintiff arbitration to resolve employee claims. Staffing industry clients are other businesses that seek to quickly and effectively increase staffing required by busy periods, major projects or overall growth. Staffing companies provide a competitive edge in matching resources and payroll to business needs, creating a more flexible, agile workforce that is valued in the American economy.

TrueBlue, Inc. ("TrueBlue") is a significant member of the staffing industry known for providing high-quality, flexible workforces to clients. In 2016, TrueBlue connected over 815,000 people with work through its staffing, on-site workforce management and recruitment process outsourcing services. TrueBlue focuses on blue-collar industrial employment, which serves as a bridge from unemployment or underemployment, and provides training for higher paying jobs. Last year alone, TrueBlue's blue-collar divisions placed 349,087 employees with over 121,440 businesses across our nation. Additionally, TrueBlue is the leading recruiter of U.S. military veterans, placing more military veterans in full-time employment than any other recruiting firm.

TrueBlue has a long-standing practice of entering into individual arbitration agreements with its employees containing class and collective action waivers.

The agreements embody TrueBlue's philosophy of addressing employee disputes directly, promptly and efficiently. Generally, these agreements provide that in disputes involving less than $10,000, TrueBlue will pay all arbitration filing fees, and the employee can choose a less expensive, streamlined arbitration process. TrueBlue's individual arbitration agreement has been challenged in several lawsuits that have also sought to add TrueBlue's clients as parties, in an apparent effort to pressure TrueBlue into class or collective settlements. The agreement also has been challenged before the National Labor Relations Board, where the Board ordered, in part, that a TrueBlue subsidiary cease using a mandatory arbitration agreement with a class or collective action waiver. *See Labor Ready Sw., Inc., a subsidiary of TrueBlue, Inc. and Jason Kuller, Esq. of Thierman Law Firm, P.C.*, Case No. 31-CA-072914, 363 NLRB No. 138, 2016 NLRB LEXIS 159 (Feb. 26, 2016). The Petition for Review of that order to the District of Columbia Circuit remains pending, and has been stayed along with other arbitration-related cases pending before the D.C. Circuit until this Court decides the Consolidated Cases.[2] TrueBlue thus has a direct interest in the outcome of these pending Supreme Court appeals, since the majority of its large workforce is subject to

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[2] For convenience, *Amici* refer to the consolidated cases, *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300; and *National Labor Relations Board v. Murphy Oil USA*, No. 16-307 as the "Consolidated Cases."

mutually-agreed upon, individual arbitration agreements containing class and collective action waivers.

Staffmark is one of the United States' top ten staffing companies, providing innovative solutions for approximately 4,500 customers, in 30 states. Staffmark provides job opportunities and payroll for an average of 40,000 employees each week and is a solutions-driven partner in industries ranging from administrative and office to information technology. It operates in the Seventh, Fifth and Ninth Circuits, and thus has a direct interest in resolving this Circuit split regarding the enforceability of class action waivers in the employment context. A decision on these cases will provide Staffmark with certainty as to the enforceability of its agreements nationwide.

On Assignment, Inc., located in Calabasas, California, is one of the ten largest staffing firms in the United States primarily providing highly-skilled professionals for in-demand jobs in the technology, digital, creative, healthcare technology, and life sciences sectors. In 2016, On Assignment employed over 56,000 individuals, and 95 percent of its revenues came from services provided in the United States. On Assignment uses individual arbitration agreements with class action waivers that have opt-out clauses and thus has a concrete interest in these cases.

BelFlex Staffing Network, LLC is a family-owned light industrial staffing company with 25 offices in twelve states throughout the Midwest and Southeast. Last year, BelFlex placed almost 24,000 individuals

with 700 different employers involved in warehousing, logistics, manufacturing, and assembly operations. BelFlex provides these employees with training and advancement opportunities that might otherwise be unavailable. Indeed, a sizeable percentage of BelFlex's employees transition to full-time employment with clients. BelFlex has a direct interest in these cases so that it can continue to efficiently resolve disputes in individual arbitration, and devote its resources toward its core mission.

Without the ability to resolve disputes efficiently through individual arbitration, staffing industry providers' costs would rise dramatically – facing what this Court described in *Concepcion* as bet the company litigation, with only very limited ability to appeal:

> We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

*AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011). The reality is that due to the sheer number of Americans the staffing industry employs, the mere threat of class action litigation can force large settlements, regardless of the merits of the action. These settlement costs could preclude the industry from employing millions, and undoubtedly increase the burden of finding work for some of the most vulnerable American workers.

The Restaurant Law Center ("Law Center") is a public policy organization affiliated with the National Restaurant Association, the largest foodservice trade association in the world. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing almost 14.7 million people – approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the nation's second-largest private-sector employers.

The Law Center provides courts with the industry's perspective on legal issues significantly impacting it. Specifically, the Law Center highlights the potential industry-wide consequences of pending cases such as these, through *amicus* briefs on behalf of its industry.

Many companies in the foodservice industry include arbitration agreements in their employment contracts because arbitration is an efficient means for parties to settle disputes promptly while avoiding the higher costs of traditional litigation. Relying on the Federal Arbitration Act and this Court's decisions, many foodservice establishments, particularly those with large workforces, have structured employment relationships based on agreements that call for individual arbitration. If the position now taken by the National Labor Relations Board were to prevail, it would nullify these arbitration agreements. Hence, the Law Center and its affiliates have vital stakes in these proceedings.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, the only branch of government Constitutionally-empowered to make laws, has passed numerous statutes impacting employment relationships in the workplace, including the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"), the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA") and the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* ("FLSA"). But, Congress has not created a hierarchy of these laws. The National Labor Relations Board (the "Board" or "NLRB"), is empowered to enforce only the NLRA. Yet, it has decided to unilaterally undermine express rights in these other federal laws and create new law granting rights to employees that do not exist in any federal law (or this Court's precedent).

When Congress speaks through legislation, it means what it says. "[I]t does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). In these Consolidated Cases, the dispute is about what Congress meant when it enacted not just one statute, but three – the FAA, the NLRA, and the FLSA. Certainly, Congress did not craft the NLRA to be superior to any other federal statute. Nor should this Court.

Each of the Consolidated Cases features wage-and-hour allegations governed by the substantive provisions of the FLSA. The cases cannot, therefore, be resolved simply by analyzing the language of Section 7 of the NLRA to determine if it provides a federal right

to pursue class or collective claims, despite the absence of any textual basis in Section 7 for doing so. Statutory interpretation principles dictate that the procedural rights granted by Section 16(b) of the FLSA delimit the scope of the NLRA. Similarly, mandatory provisions of the FAA govern the extent to which individuals, having waived their procedural rights to collective relief, must arbitrate their FLSA claims, regardless of what the NLRA might say.

This dispute is before this Court because the NLRB – followed by the Seventh and Ninth Circuits – concluded that the NLRA guarantees a non-waivable path to bring collective claims – as if bringing aggregate legal claims were a newfound standalone right. The Board's conclusion, however, fails to account for the actual language Congress used in enacting the FAA, the NLRA, and the FLSA. The NLRB position substitutes policy preferences for statutory language. This result violates several rules of statutory interpretation and cannot be squared with the existence of waivable collective-action rights available under the FLSA and the FAA's individual arbitration mandate.

## ARGUMENT

### I. Supreme Court Case Law Creates The Framework For Enforcing Arbitration Agreements.

The FAA and this Court's precedents manifest a long-standing "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985). Arbitration agreements are on the same footing as other contracts, and must be "rigorously enforce[d]". *Id.* at 217, 221; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

For more than 25 years, the Court has made clear that employees can waive the right to pursue claims on a class or collective basis. In *Gilmer*, the Court rejected an employee's argument that he could not be forced to arbitrate his claims under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), in part, because "the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at *conciliation* were intended to be barred." *Id.* at 32 (internal quotation and alteration marks omitted).

Throughout the past decade, the Court has reinforced its long history of enforcing arbitration agreements as written. In 2010, the Court examined significant differences between bilateral and class arbitration, concluding that the "relative benefits of class-action arbitration are much less assured." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662,

685 (2010). Consequently, the Court held "parties may specify *with whom* they choose to arbitrate," and class arbitration is not permitted "unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 683-84.[3]

In 2011, the Court upheld class waivers in consumer arbitration agreements, reversing a Ninth Circuit decision holding these provisions unconscionable under California law. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The Court explained "[t]he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms." *Id.* at 344 (internal quotation and alteration marks omitted). Requiring the availability of class arbitration irrespective of the arbitration agreement's language, was inconsistent with the FAA and would "sacrifice[] the principal advantage of arbitration – its informality – and make[] the process slower, more costly, and more likely to generate procedural morass than final judgment." *Id.* at 348, 352.

The following year, the Court held in *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012) that courts must enforce arbitration agreements according to their

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[3] *See also* Michael Hoenig & Linda M. Brown, *Arbitration & Class Action Waivers Under* Concepcion: *Reason & Reasonableness Deflect Strident Attacks*, 68 ARK. L. REV. 669, 673-87 (2015) (arguing class actions are slow, implicate conflicts of interest between attorneys and class members, have *in terrorem* effect of forcing settlement of unmeritorious claims, and result in smaller recoveries for class members compared to individual actions).

terms, "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* at 669. Specifically, *CompuCredit* suggested statutory language explicitly stating arbitration was unacceptable would be necessary to override the FAA. *Id.* at 672-73 (collecting statutes explicitly referencing arbitration).

The trend continued in 2013 when the Court again upheld arbitration agreements containing class waivers in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013). The Court recognized that while an "effective vindication" exception exists to the FAA's policy of enforcing arbitration agreements according to their terms, this exception applies only when the arbitration agreement would waive a "*right to pursue statutory remedies.*" *Id.* at 2310-11 (internal quotation marks omitted). A class-action waiver merely limiting arbitration to two contracting parties does not qualify for the exception because it leaves access to statutory remedies intact. *Id.*[4]

Thus, to avoid an arbitration agreement containing an explicit class and collective-action waiver, a plaintiff must show either: (1) a clear congressional command overrides the FAA's policy of enforcing arbitration agreements as written, or (2) the "effective

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[4] Citing *Gilmer*, the Court noted it previously had "no qualms in enforcing a class action waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Am. Express*, 133 S. Ct. at 2311.

vindication" exception applies because the arbitration agreement waives the plaintiff's right to pursue statutory remedies. *See Am. Express*, 133 S. Ct. at 2309-12; *CompuCredit*, 132 S. Ct. at 669.

The NLRA contains no contrary congressional command.[5] There is no mention of "litigation" anywhere – much less class or collective litigation – within Section 7. 29 U.S.C. § 157. *See also D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 360 (5th Cir. 2013). Given this statutory silence, Section 7 cannot be read to override the FAA's presumption in favor of enforcing arbitration agreements. *CompuCredit*, 132 S. Ct. at 673; *Gilmer*, 500 U.S. at 32.

Nor does a class and collective waiver extinguish any statutory remedies available under the NLRA. The remedies employees seek to vindicate in class or collective lawsuits are those provided by the state or federal law under which they bring their claims – not the NLRA. Individual arbitration agreements affect only

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[5] Section 7 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

*how* plaintiffs may vindicate a right – through individual arbitration – not *whether* they may vindicate it. *See Am. Express*, 133 S. Ct. at 2311 (where the same statutory remedy is available in both individual and class suits, "the individual suit that was considered adequate to assure 'effective vindication' of a federal right . . . did not suddenly become 'ineffective vindication'" just because class procedures were available in a judicial forum) (citing *Gilmer*, 500 U.S. at 32). *See also* Stacey L. Pine, *Employment Arbitration Agreements and the Future of Class-Action Waivers*, 4 AM. U. LAB. & EMP. L.F. 1, 18-24 (2014) (arguing Supreme Court precedent makes clear that class waivers are enforceable).

*Amici*, in particular, have relied upon this consistent line of case law establishing the primacy of contractual freedom, which clarifies that employment arbitration agreements containing class and collective-action waivers are enforceable. *Amici* and their members have crafted alternative dispute resolution programs establishing arbitration as a less costly, more informal, and quicker means of resolving wage and hour and other employment claims. Arbitration also lessens the burdens of the federal courts. Not only that, *amici* TrueBlue specifically excepts NLRA claims from its arbitration agreements with employees, preserving their right to pursue such claims administratively. The concern created by the Seventh and Ninth Circuits' divergence is more than academic. Workplace expansion requires that employers – the front line of job creation – have an efficient way to resolve minor disputes

without interference from interests that do not benefit their employees or who have a separate profit motivation.[6] This Court's FAA jurisprudence of more than 25 years permitted that efficiency because it outlined the framework for enforcing class and collective-action waivers within arbitration agreements.

Nothing in the NLRA, which contains neither actual class structures, nor a contrary congressional command, changes that analysis. Put another way, in the absence of clear congressional intent, there is no basis

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[6] Frequently, the primary beneficiaries of class litigation are class counsel rather than the class members themselves. *See, e.g.*, John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 COLUM. L. REV. 370, 371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self interest."). Moreover, § 16(b) actions are among the most commonly-filed types of aggregate litigation because the specter of conditional certification leverages substantial settlement pressure upon defendants. *See* Rachel K. Alexander, *Federal Tails and State Puppy Dogs: Preempting Parallel State Wage Claims to Preserve the Integrity of Federal Group Wage Actions*, 58 AM. U.L. REV. 515, 541 (2009) (noting that FLSA conditional certification results in settlement pressure because it "signals the potential expansion of the case and the need for significant and expensive class-wide discovery"); Allan G. King, Lisa A. Schreter, Carole F. Wilder, *You Can't Opt Out of the Federal Rules: Why Rule 23 Certification Standards Should Apply to Opt-in Collective Actions Under the FLSA*, 5 FED. CTS. L. REV. 1, 10 (2011) ("Because conditional certification frequently subjects employers to 'mind-boggling' discovery, the costs and resources required to defend a case, even if only 'conditionally' certified, place enormous pressure on employers to settle prior to reaching the second, decertification step.").

for rejecting the benefits of arbitration that have worked well for millions of employers and employees.

## II. The FAA Savings Clause Does not Apply to the Consolidated Cases Because Alleged Illegality is Neither Present nor Applicable.

The Circuit split below is largely based on the Ninth and Seventh Circuits' creative but skewed views of Section 2 of the FAA. The savings clause that resides within Section 2 provides a means of avoiding FAA-mandated enforcement of an arbitration agreement only in narrow circumstances related to a dispute about the formation of the underlying arbitration agreement.

The Seventh and Ninth Circuits, however, both read the savings clause far broader than the clear language Congress drafted. In so doing, they condone construing the savings clause to attack valid arbitration agreements by using Board-designed policy on NLRA substantive rights as a sword fatal to *all* class and collective action waivers.[7] This strained reading and unwarranted expansion of a narrow savings clause

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[7] Recently, a divided Sixth Circuit pursued a similar analysis in *NLRB v. Alternative Entertainment, Inc.*, No. 16-1385, 2017 WL 2297620 (6th Cir. May 26, 2017). The majority's rationale provoked Judge Jeffrey Sutton to respond in dissent: "If Congress wanted to create unwaivable rights to pursue class actions or other collective lawsuits, it would place that right in the workplace-rights statutes themselves, not in the NLRA in 1935. The Board's theory is worse than assuming Congress would place elephants in mouseholes. It assumes that Congress forgot how to write statutes." (Citations omitted). *Id.* at *16.

applicable only in discrete contract-related situations finds no support in the statutes or the case law. It is not – and cannot be, in effect, re-written by the NLRB or the courts to constitute – an all-encompassing shield against FAA enforcement. Nor does it create a policy-making path for the NLRB's reinterpretation of employee rights under the NLRA.

### A. The NLRA Does not Guarantee Workers' Rights to Bring Collective or Class Claims Because the FLSA and Rule 23 Created Those Procedural Rights.

#### 1. The rights to collective and class procedures that are voluntarily waived in arbitration agreements originate in the FLSA and Rule 23 – not the NLRA.

The Board contends that the NLRA's non-waivable "core substantive right" is for employees to pursue collective litigation. *See In Re D.R. Horton, Inc.*, 357 NLRB 2277, 2286 (2012). The Board errs by focusing on the wrong source for those claims. In the Consolidated Cases, the FLSA and Rule 23 provide the class and collective-action vehicles. The NLRA contains no parallel mechanism. At most, if one accepts the Board position, the NLRA may create a substantive *opportunity* to pursue collective litigation.[8]

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[8] The Board, along with the Seventh Circuit, argues that it is merely the opportunity to pursue collective litigation, rather than the right to class certification, that the NLRA protects. *See*,

But in each of the Consolidated Cases, employees *had* the opportunity – and exercised it – to pursue collective actions under the FLSA.[9] In defense of those actions, employers argued that the employee-plaintiffs could not maintain § 16(b) collective actions because the arbitration agreements required individual arbitration. That is, the arbitration agreements enabled the employers to defend against the FLSA's and Rule 23's procedural frameworks for aggregate litigation. They did not infringe upon any concerted activity right under the NLRA.[10] The same, in fact, is true of *amici*

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*e.g.*, *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) ("the Board's holding does not 'guarantee[ ] class certification, . . . [but] only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law.' ").

[9] In *Epic Systems*, the employer responded to a hybrid Rule 23 and Section 16(b) action by filing a motion to compel arbitration. The district court denied the motion on the basis that Section 7 rights prevailed over FAA arbitration rights. *Epic Systems*, 823 F.3d at 1151. Effectively the same claims and procedures occurred in *Morris* except that the district court granted the motion to compel individual arbitration, which the Ninth Circuit vacated. *Morris*, 834 F.3d at 990. In *Murphy Oil*, the employer filed a motion to dismiss and compel individual arbitration in response only to a Section 16(b) collective action. While its motion to dismiss and to compel individual arbitration was pending, one of the plaintiffs filed an unfair labor practice charge with the Board, arguing that the arbitration agreement interfered with her Section 7 rights. *Murphy Oil*, 361 NLRB No. 72.

[10] The Board's General Counsel previously recognized this precise distinction in 2010 when he issued a memorandum, recognizing that employer-defendants relying on class waivers in arbitration agreements did not interfere with Section 7 rights. The memorandum explained: "an individual employee's agreement

TrueBlue's arbitration agreements, which expressly inform employees that the agreements wholly preserve their rights to seek relief under the NLRA.

Notably, the NLRA has not been the basis for collective relief in any of the Consolidated Cases. That statute has never provided the substantive claims or procedural framework for collective litigation. Rather, the waivable rights to collective and class litigation exist solely under § 16(b) and Rule 23.

No one even attempts to argue that FLSA and Rule 23 procedural rights cannot be waived. The federal Circuit Courts of Appeal that have directly addressed this question have unanimously held that the collective rights under the FLSA are waivable, procedural rights as long as the waiver is part of an arbitration agreement enabling the employee to vindicate his or her rights on an individual basis. Most recently, the Eleventh Circuit addressed this issue in *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014) when citing the unanimous Circuit Courts

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not to utilize class action proceedings in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right." NLRB Gen. Counsel Mem. 10-06 at 6 (June 16, 2010). "[N]o Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment and . . . no Section 7 right is violated when that individual agreement is enforced." *Id.* Although the individual employee, of course, "cannot be disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim," "the employer's recourse in such situations is to present to the court the individual *Gilmer* waivers as a defense to the class action claim." *Id.*

in concluding the FLSA does not provide an absolute right to pursue collective actions. *Id.* at 1336 (citing cases from the Second, Fourth, Fifth and Eighth Circuits and noting that "All of the circuits to address this issue have concluded that § 16(b) does not provide for a non-variable, substantive right to bring a collective action.").[11]

This Court, of course, concluded in *Gilmer* that there is no substantive right to class procedures under ADEA, even though the statute provides for aggregation procedures that mimic and are based on § 16(b). *Gilmer*, 500 U.S. at 32; *see also Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 170, (1989) (noting that the ADEA incorporates its collective action procedures from § 16(b) of the FLSA). And in the context of Rule 23, *American Express* clarified that absent a clear "contrary congressional command" within a statute, there is no basis "to reject the waiver of class arbitration" under the FAA. 133 S. Ct. at 2311.

So even if the NLRA did in some way support the right to pursue collective litigation, it does not contain a contrary congressional command to the FAA that would foreclose an employer from relying on a class waiver in an arbitration agreement to defend against such an action. The procedural rights under the FLSA

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[11] In 2014, the Sixth Circuit acknowledged the validity of this reasoning, but declined to enforce a class waiver "[b]ecause no arbitration agreement [was] present in the case" so there was "no countervailing federal policy that outweighs the policy articulated in the FLSA." *Killion v. KeHE Distributors, LLC*, 761 F.3d 574, 592 (6th Cir. 2014).

and Rule 23 are and have always been waivable (unlike the substantive wage and hour protections built into the FLSA). Such valid waivers do not interfere with Section 7 of the NLRA, which does not guarantee success in the face of all obstacles, including class waivers.

### 2. Harmonizing the NLRA and the FLSA clarifies that the NLRA does not provide a right to maintain a collective or class action.

When Congress passed the NLRA in 1935, neither the actual text of the statute nor the legislative history reflected an intent to guarantee workers a right to class or collective action relief. *See Murphy Oil USA, Inc.*, 361 NLRB No. 72 (Oct. 28, 2014) (Member Miscimarra, now NLRB Chair, dissenting) ("The Act cannot reasonably be interpreted as giving employees a broad-based right to 'class' treatment under *other* Federal, State, and local laws. Indeed, . . . most of these other laws – and the modern treatment of 'class' litigation – did not even exist until long after the NLRA was enacted.") (emphasis in original). Nevertheless, concern regarding workers' rights to seek relief for wage and hour issues simmered during the 1930s as political and economic forces transformed the American workplace. In response, Congress passed the FLSA in 1938. *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 706 (1945) (examining the FLSA's legislative history to conclude that there was Congressional intent "to protect certain groups of the population from substandard wages and

excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce").

For the first time, a federal statute granted workers the procedural right to bring collective actions against their employers to enforce their statutory rights under the FLSA.[12] Specifically, the 1938 version of the FLSA empowered a single employee to bring representative actions on behalf of all similarly-situated co-workers to remedy alleged wage-and-hour violations.

Congress inserted the collective action mechanism into the FLSA because there were *no existing collective-action procedures*. After all, Congress does not enact meaningless statutes or insert superfluous

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[12] The legislative history regarding § 16(b) is modest, with the only reference provided by Representative Keller who stated:

> If there shall occur violations of either the wages or hours, the employees can themselves, or by designated agent or representatives, maintain an action in any court to recover the wages due them and in such a case the court shall allow liquidated damages in addition to the wages due equal to such deficient payment and shall also allow a reasonable attorney's fees and assess the court costs against the violator of the law so that employees will not suffer the burden of an expensive lawsuit. * * * The bill has other penalties for violations and other judicial remedies, but the provision which I have mentioned puts directly into the hands of the employees who are affected by violation the means and ability to assert and enforce their own rights, thus avoiding the assumption by Government of the sole responsibility to enforce the act.

*Brooklyn Sav. Bank*, 324 U.S. at 706 citing 83 Cong. Rec. p. 9264.

language into statutes. *Bilski v. Kappos*, 561 U.S. 593, 607-08 (2010) (holding a statutory construction to be improper that "would violate the canon against interpreting any statutory provision in a manner that would render another provision superfluous.") If the NLRA provided a right to pursue collective relief when Congress passed it in 1935, Congress would not have needed to enact § 16(b) of the FLSA three years later. *See id.* (explaining that the rule against superfluous constriction "applies to interpreting any two provisions in the U.S. Code, even when Congress enacted the provisions at different times."). And, it wouldn't have been free to curtail that right in 1947. *See id.* Indeed, restriction of those supposed collective rights under the Portal-to-Portal Act of 1947 most certainly would have brought the amended version of the FLSA into conflict with the NLRA. But it did not.[13]

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[13] Congress eventually made it clear that the substantive rights contained in the FLSA – such as the right to minimum wage – do not include the right to representative actions. In 1947, Congress amended § 16(b) in the Portal-to-Portal Act Amendments to the FLSA. § 5, 61 Stat. 84, 87-88 (1947). These amendments added the opt-in requirement and repealed a provision in section 16(b) "permitting an employee or employees to designate an agent or representative to maintain an action for and in behalf of all employees similarly situated." H.R. Conf. Rep. No. 80-326, at 13 (1947). These changes had "the purpose of limiting private FLSA plaintiffs to employees who asserted claims in their own right and freeing employers of the burden of representative actions." *Hoffman-La Roche*, 493 U.S. at 173. Moreover, Senator Donnell, then Chairman of the Senate Judiciary Committee, articulated the rationale for the provision: "[I]t is certainly unwholesome to allow an individual to come into court alleging that he is suing on behalf of 10,000 persons and actually not have a solitary

Properly analyzed in the context of the FLSA, rather than the NLRA, class and collective action waivers are unquestionably valid, and outside the scope of the FAA's savings clause, regardless of the asserted contractual defense.

### B. Claimed Illegality is not an Exception Under the FAA's Savings Clause.

The FAA's savings clause, which the Seventh and Ninth Circuits and the Board rely on to avoid FAA enforcement, is inapplicable here for a more fundamental reason.[14] Claimed illegality is not a defense subject to savings clause application.

The savings clause contained in Section 2 of the FAA is restricted in application by its own language:

> A written provision in . . . a contract . . . to settle by arbitration a controversy thereafter

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person behind him, and then later on have 10,000 men join in the suit, which was not brought in good faith, was not brought by a party in interest, and was not brought with the actual consent or agency of the individuals for whom an ostensible plaintiff filed the suit." *See Arrington v. Nat'l Broad. Co., Inc.*, 531 F. Supp. 498, 502 (D.D.C. 1982) (quoting 93 Cong. Rec. 2182 (1947)).

[14] In *Epic Systems* and *Morris*, the Seventh and Ninth Circuits did not acknowledge that collective litigation, under either Rule 23 or the FLSA, is a waivable, procedural right, regardless of the presence of the NLRA. Instead, those courts followed the Board's lead and concluded that under the NLRA, an arbitration agreement waiving class litigation rights is illegal, and that supposed illegality renders the agreement unenforceable under FAA's savings clause.

> arising out of such contract . . . shall be *valid*, *irrevocable*, and *enforceable*, save upon such grounds as exist at law or in equity for the *revocation* of any contract.

(FAA § 2, 9 U.S.C. § 2) (emphasis added). That is, the savings clause, which begins with the word "save," provides an exception to enforcement of arbitration agreements only upon grounds that apply to *revocation*. Congress deliberately chose not to include defenses based on validity or enforceability within the clause. The meaning of "revocation" in Section 2 must further be squared with Section 4 of the FAA, limiting the means of denying arbitration:

> The court shall hear the parties, and upon being satisfied that the *making of the agreement for arbitration* or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). In harmony with Section 4, "revocation" refers to an appropriate revocation of the contract based on a legal flaw in the formation of the agreement. That is the sole means under Section 4 by which a court can deny a motion to compel arbitration and resolve a dispute otherwise subject to an arbitration agreement.

The savings clause was designed to apply only where contract formation was in question. Before the FAA, parties could strategically revoke their agreement to arbitrate without regard to contract law

constraints. Arbitration clauses existed, "but they [were] used with undue caution and a great degree of uncertainty because of the revocability of the arbitration agreements after trouble has arisen and after arbitration has commenced." Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the S. Subcomm. on the Judiciary. 67th Cong. 3-4 (1923) (Statement of Charles L. Bernheimer). The hearings leading up to the passage of the FAA reflect this concern:

> "The difficulty is that men do enter into such agreements and then afterwards repudiate the agreement, and the difficulty has been that for over 300 years, for reasons which it would take me too long to undertake to explain at this time, the courts have said that that kind of agreement was one that was revocable at any time."

Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary. 68th Cong., 14 (1924) (Statement of Julius Henry Cohen).

Sections 2 and 4 of the FAA filled that gap by providing the relief that the business community sought for arbitration agreements – equal footing with other contracts. Prior to final passage, Congress explained that parties could seek refuge under the savings clause by asserting that "no arbitration agreement was ever made." H.R. Rep. 96 at 2, 68th

Cong. 1st Session, Jan. 24, 1924.[15] Absent such a formation-based defense, however, Section 4 required a court to compel arbitration via "very simple" motion practice. *Id.*

In Section 2, Congress deliberately chose to subordinate public policy-based contract defenses, which bear on enforceability, in favor of FAA-backed enforcement to rid the "anachronism of our American law" that until then permitted free-wheeling repudiation of arbitration agreements. H.R. Rep. 96 at 1. Therefore, "Contract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause." *Concepcion*, 563 U.S. at 355 (Thomas, J., concurring).

As a result, a court may set aside an arbitration agreement if – and only if – "a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Concepcion*, 563 U.S. at 354 (Thomas, J., concurring); *see also Hudson v. Citibank (S. Dakota) NA*, No. S-14740, 2016 WL 7321567, at *4 (Alaska Dec. 16, 2016) (refusing to

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[15] The stated reasoning behind the savings clause dovetails with testimony presented to Congress in 1924 during deliberations. *See, e.g.*, Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomm. on the Judiciary. 68th Cong., 14 (1924) (Brief submitted regarding The Proposed Federal Arbitration Statute, at 35) ("At the outset the party who has refused to arbitrate because he believes in good faith that his agreement does not bind him to arbitrate, or that the agreement is not applicable to the controversy, is protected by the provision of the law which requires the court to examine into the merits of such a claim.")

apply a waiver defense to invalidate an arbitration agreement because "'the conspicuous omission of "invalidation" and "nonenforcement" suggest that the exception does not include all defenses applicable to any contract but rather some subset of those defenses.'") (quoting *Concepcion*, 563 U.S. at 354, Thomas, J., concurring). Otherwise, under Section 4, a court must issue an order compelling arbitration, at which point a party is free to raise other defenses to the contract as a whole. *Halcon Int'l, Inc. v. Monsanto Australia, Ltd.*, 446 F.2d at 156, 159 (7th Cir. 1971); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967) ("the federal court is instructed to order arbitration to proceed once it is satisfied that 'the making of the agreement for arbitration or the failure to comply (with the arbitration agreement) is not in issue.'").

The Seventh and Ninth Circuits sidestepped the distinction between a revocation-based defense and a public-policy-type defense by asserting that illegality is a general defense that is tied to contract formation. *Epic Systems*, 823 F.3d at 1157 ("Because the provision at issue is unlawful under Section 7 of the NLRA, it is illegal, and meets the criteria of the FAA's saving clause for nonenforcement"); *Morris*, 834 F.3d at 985 ("The FAA recognizes a general contract defense of illegality").

On the contrary, however, this Court has been quite clear that "[t]he whole doctrine of avoiding contracts for illegality and immorality is founded on public policy" – not contract formation. *See Hanauer v.*

*Doane*, 79 U.S. 342, 349 (1870); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982) ("illegal promises will not be enforced in cases controlled by the federal law"); *McMullen v. Hoffman*, 174 U.S. 639, 669 (1899) ("The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest.").

Thus, illegality is not a defense related to the making or formation of a contract. Rather, those defenses include "fraud, duress, or unconscionability," which under Section 2 may be used to avoid enforcement through revocation. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682 (1996).

Even if illegality were a defense in the Consolidated Cases, it is not the type of defense that the FAA permits to revoke the arbitration agreement. As a public-policy-based defense, illegality does not fall within the contract formation realm required for savings clause application under Section 2. Therefore, the savings clause is inapplicable under these circumstances, and absent a contrary congressional command specifically excepting the NLRA from the FAA's reach, the FAA's pro-enforcement policy prevails. *See CompuCredit*, 565 U.S. at 98.

### C. The *ejusdem generis* canon confirms that Section 7 does not refer to collective or class litigation.

Applying the *ejusdem generis* canon, "other concerted activities" must be interpreted in context and is limited to activities like the unionizing and collective bargaining referenced in the statute. *See, e.g.*, *Yates v. United States*, 135 S. Ct. 1074, 1086-87 (2015) (holding general phrase "tangible object" was limited to "things used to record or preserve information" where it was part of statutory phrase referring to anyone who "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object"); *Sossamon v. Texas*, 563 U.S. 277, 292 (2011) (limiting residual phrase "or the provisions of any other Federal statute prohibiting discrimination" to federal statutes explicitly referencing discrimination where phrase followed citation to four other federal statutes explicitly prohibiting discrimination); *Norton v. So. Utah Wilderness Alliance*, 542 U.S. 55, 61-63 (2004) (holding "failure to act" was limited to failure to take discrete agency action where it followed reference to "agency rule, order, license, sanction, relief"). This phrase could include, for example, picketing, distributing literature, or collecting signatures on petitions aimed at influencing an employer's activities.

The Seventh and Ninth Circuits ignored this well-established canon in reading "other concerted activities" to create a right to file class and collective lawsuits. Instead of examining the language in context, the Seventh Circuit referred to dictionary definitions

of "concerted activities," opined that a broad reading of the phrase was consistent with "[t]he NLRA's history and purpose," and then followed the NLRB's post-2010 interpretation of the phrase. *Epic Systems*, 823 F.3d at 1153. The Ninth Circuit relied almost exclusively on deference to the NLRB as its justification for holding that "concerted activities" includes lawsuits. *Morris*, 834 F.3d at 980-84.

Both Circuits' approaches violate the basic rule that the starting point of any statutory construction is examining the language of the statute itself. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). *See also Yates*, 135 S. Ct. at 1080-82 (whether language is ambiguous "does not turn solely on dictionary definitions," but rather requires examination of "the specific context in which that language is used, and the broader context of the statute as a whole" (internal quotation marks omitted)). Because the general phrase "other concerted activities" follows more specific references to unionizing and collective bargaining, the analysis ends with the statute's words. There is no basis to interpret "other concerted activity" to include participating in class or collective lawsuits where other more specific terms clearly refer to unionizing and collective bargaining.

## III. The Board is not Entitled to Deference in Construing the NLRA in Conjunction with the FAA.

Normally this Court might defer to the Board's reasonable interpretation of ambiguous NLRA provisions. *See Chevron*, 467 U.S. 837; *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs. (Brand X)*, 545 U.S. 967 (2005). But it would be inappropriate to defer to the Board's construction of the NLRA in this instance because there is no ambiguity and, to do so allows the NLRB, not Congress, to decide that its statutory powers trump the FLSA and the FAA. *Chevron* deference should not be expanded to give a federal agency the power to ignore Congress and to decide what the law should be.

First and foremost, there is no ambiguity requiring deference here. The judiciary is more than capable of reading the plain language of NLRA Section 7 and FAA Section 2 – neither of which support the Board's position that Section 7 prevents employers from defending against a class or collective action by relying on an FAA-enforceable arbitration agreement. *See, e.g.*, *Lechmere*, 502 U.S. at 539 (denying Board deference regarding the scope of Section 7 rights because it "rest[s] on erroneous legal foundations"). This is "a pure question of statutory construction," in which this Court's "first job is to try to determine congressional intent, using 'traditional tools of statutory construction.'" *NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987).

Second, the presence of the FAA as potentially controlling forecloses any deference to the Board. *Chevron* deference does not apply when two statutes must be construed and the agency has policy-making authority over only one of them.[16] In similar circumstances, such as when the Board sought deference for interpreting the Bankruptcy Code, this Court has rejected such deference. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress's intent in passing the Bankruptcy Code.").

Plainly, however, even where applicable the Board's "discretion has limits." *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Those limits are reflected by the legal balance that must be struck when the Board pursues NLRA policy goals that intrude upon the territory of other federal statutes. As this

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[16] Congress, of course, has not delegated interpretative authority to the Board regarding the FAA, or an ambiguity reflected by the FAA. As "[a]gencies are creatures of Congress; 'an agency literally has no power to act . . . unless and until Congress confers power upon it.'" *City of Arlington v. FCC*, 133 S. Ct. 1863, 1880 (2013) (Roberts, J. dissenting) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)). "An agency interpretation warrants such deference only if Congress has delegated authority to definitively interpret a particular ambiguity in a particular manner." *Id.* at 1883. There is, thus, no support for extending any deference to the Board's interpretation of the FAA's savings clause or any other FAA provision.

Court has posited: "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Southern S.S. Co.*, 316 U.S. at 47 (Board was entitled to no deference in its conclusion that employees did not violate federal mutiny statute, thereby entitling them to back pay). Since *Southern S.S. Co.*, this Court has never deferred to the Board when its interpretations of the NLRA "potentially trench upon federal statutes and policies unrelated to the NLRA":

> Thus, we have precluded the Board from enforcing orders found in conflict with the Bankruptcy Code, *see Bildisco*, []at 527-534, 529, n.9, 104 S. Ct. 1188 ("While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel"), rejected claims that federal antitrust policy should defer to the NLRA, *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 [] (1975), and precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act, *Carpenters v. NLRB*, 357 U.S. 93, 108-110 [] (1958).

*Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

Beginning in *D.R. Horton*, the Board ventured well beyond interpreting the scope of Section 7 rights under the NLRA. It further interpreted Section 2 of the FAA,

and concluded that the savings clause within Section 2 invalidated an arbitration agreement that – in the Board's opinion – violated public policy by depriving employees of Section 7 rights to bring collective legal claims. *See In Re D.R. Horton, Inc.*, 357 NLRB 2277, 2287 (2012) (expounding upon Section 2 and savings clause policy and concluding that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable").[17]

Third, the Board's position in the Consolidated Cases reflects shifting Board policy concerns that should not affect this Court's statutory construction analysis. Indeed, just seven years ago, the Board took a different approach.[18] NLRB Gen. Counsel Mem. 10-06. But the issue is what Congress meant when the NLRA was passed in 1935, not what the emergent policy was in 2010 or 2012 when *D.R. Horton* was decided.

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[17] Both the Seventh and Ninth Circuits applied *Chevron* deference to the Board, even though the Board has no policy-making position with regard to the FAA and even though its interpretation of the NLRA had recently changed. The Eighth Circuit, by contrast, in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013) rejected *Chevron* deference because "the Board has no special competence or experience in interpreting the Federal Arbitration Act." *Id.* (quoting *Delock v. Securitas Sec. Servs. USA*, 883 F. Supp. 2d 784, 787 (E.D. Ark. 2012).

[18] An administrative agency's reasoning may be entitled to *Chevron* deference even following a change in position. However a change in position that reflects "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *Brand X*, 545 U.S. at 981).

*See MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) (the "most relevant time for determining a statutory term's meaning" is when the statute was passed).

It is the province of the judiciary – not the executive – "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In fact, "the question whether Congress has or hasn't vested a private legal right in an individual 'is, in its nature, judicial, and must be tried by the judicial authority.'" *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). Permitting *Chevron* deference to control the result here would be tantamount to transferring the independence of the federal judiciary (together with Congress' law-making authority) to an administrative agency acting as legislator, executive, and judge.[19] That is not the appropriate context for *Chevron* deference.

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[19] Indeed, as stated in The Federalist No. 78 (Alexander Hamilton): "the interpretation of the laws is the proper and peculiar province of the courts" and it "belong[s] to [judges] to ascertain . . . the meaning of any particular act proceeding from the [l]egislative body."

## CONCLUSION

Congress did not provide a right to bring collective or class legal claims within the NLRA in 1935. Nothing the Board says now can change that. Congress did, however, in 1938 establish a procedural right to collective actions within the FLSA because such rights did not previously exist. That fact alone should be enough to answer the question that NLRA Section 7 contains no guaranteed right to pursue collective claims. Moreover, the savings clause of the FAA applies only to except enforcement of arbitration agreements where a dispute concerns contract formation. So a public-policy-driven defense of illegality, on the grounds that an arbitration agreement requiring individual arbitration is illegal under the NLRA, cannot stop FAA-mandated enforcement.

Arbitration agreements, like those in the Consolidated Cases, requiring individual arbitration, benefit both employees and employers, particularly in the staffing and restaurant industry. The agreements streamline resolution methods that enhance employee recovery to the full extent permitted by law and provide employers protection from the *in terrorem* effect of class litigation that rewards attorneys (on both sides) but does little in the way of job creation. This Court has never construed another statute, such as the NLRA, to invalidate these agreements when they provide for full effective vindication of individual rights. Now is not the time to change the meaning of what Congress said. The decisions of the Seventh and Ninth

Circuits should be reversed and of the Fifth Circuit affirmed.

Respectfully submitted,

JOHN B. LEWIS
*Counsel of Record*
DUSTIN M. DOW
BAKER & HOSTETLER, LLP
Key Tower, Suite 2000
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200
jlewis@bakerlaw.com

GARRETT R. FERENCZ
TIMOTHY O'DONNELL
1015 A Street
Tacoma, Washington 98402
*Counsel for Amicus Curiae TrueBlue, Inc.*

MELISSA A. SIEBERT
BONNIE K. DELGOBBO
BAKER & HOSTETLER, LLP
191 North Wacker Drive, Suite 3100
Chicago, Illinois 60606

STEPHEN C. DWYER
277 S. Washington Street, Suite 200
Alexandria, Virginia 22314
*Counsel for Amicus Curiae American Staffing Association*

ANGELO I. AMADOR
2055 L Street, N.W.
Washington, D.C. 20036
*Counsel for Amicus Curiae Restaurant Law Center*

JASON B. KLIMPL
370 Lexington Avenue, Suite 902
New York, New York 10017
*Counsel for Amicus Curiae New York Staffing Association*

KEVIN W. SHAUGHNESSY
JOYCE ACKERBAUM COX
BAKER & HOSTETLER, LLP
Sun Trust Center, Suite 2300
200 South Orange Avenue
Orlando, Florida 32801

KATHRYN S. BERNARD
435 Elm Street, Suite 300
Cincinnati, Ohio 45202
*Counsel for Amicus Curiae Staffmark*

JENNIFER HANKES PAINTER
26745 Malibu Hills Road
Calabasas, California 91301
*Counsel for Amicus Curiae On Assignment, Inc.*

CRAIG S. HOPEWELL
11591 Goldcoast Drive
Cincinnati, Ohio 45249
*Counsel for Amicus Curiae BelFlex Staffing Network, LLC*

*Counsel for Amici Curiae*